# Editor's note: Appealed – reversed, Civ. No. 74-411 (D.N.M. July 16, 1975)

### SKELLY OIL COMPANY

IBLA 74-183

Decided July 29, 1974

Appeal from decision of the New Mexico State Office, Bureau of Land Management, dated December 10, 1973, canceling oil and gas lease NM 19199.

Affirmed.

Oil and Gas Leases: Known Geological Structure

"Ascertainment," for the purposes of determining a "known geological structure of a producing oil and gas field," 30 U.S.C. §§ 226(a)-(b) (1970), 43 CFR 3100.7-3, is not the date upon which the pertinent fact is learned by the Geological Survey, but is the date upon which the pertinent fact becomes available.

Oil and Gas Leases: Bona Fide Purchaser—Oil and Gas Leases: Cancellation—Oil and Gas Leases: Lands Subject to—Oil and Gas Leases: Noncompetitive Leases

Where the Mineral Leasing Act, <u>as amended</u>, 30 U.S.C. § 226 (1970), requires competitive bidding for lands underlain by known geological structures of producing oil and gas fields, an improperly issued noncompetitive lease cannot gain life by the fact that a bona fide purchaser subsequently acquires it. 30 U.S.C. §184(h)(2) (1970).

Oil and Gas Leases: Bona Fide Purchaser: Oil and Gas Leases: Cancellation — Oil and Gas Leases: Lands Subject to — Oil and Gas Leases: Noncompetitive Leases

A bona fide purchaser of a noncompetitive lease issued for public lands not subject to noncompetitive leasing under the Mineral Leasing Act, as amended, 30 U.S.C.

§§ 226(a)-(b) (1970), is not entitled to any protection, and the lease is properly canceled as a nullity.

APPEARANCES: Clarence E. Hinkle, Esq., for Hinkle, Bondurant, Cox & Eaton, Roswell, New Mexico, for appellant, Loretta Douglas, Esq., Solicitor's Office, for appellees, Bureau of Land Management and Geological Survey.

### OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Skelly Oil Company has appealed from a decision of the New Mexico State Office, Bureau of Land Management, dated December 10, 1973, which canceled an oil and gas lease (NM 19199) of appellant.

Appellant's predecessor in interest had filed an offer for a noncompetitive lease on July 23, 1973, which was subsequently drawn at a public drawing on August 8, 1973. The lease, NM 19199, was issued September 10, 1973, to be effective October 1, 1973, pursuant to the noncompetitive leasing provisions of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(c) (1970) and the regulations, 43 CFR Part 3100. These provisions permit the issuance of a lease without competitive bidding to the first qualified applicant where "\* \* \* the lands to be leased are not within any known geological structure of a producing oil and gas field \* \* \* \*." 30 U.S.C. § 226(c).

However, in a memorandum dated November 9, 1973, the 640 acres in this lease were found by the Geological Survey to have been within an undefined addition to an undefined known geological structure as of September 9, 1973, one day prior to the issuance of the lease.

Therefore, upon receipt of the Survey's memorandum, the State Office issued the decision canceling appellant's lease. Appellant had acquired the lease in an assignment which was approved by the State Office on November 1, 1973.

The challenged decision states:

This lease was issued subject to the determination by the Geological Survey as to whether the lands herein described were on a known geologic structure of a producing oil and gas filed [sic] as of the date of signing hereof by the authorized officer [see 30 U.S.C. §§ 226(b)-(c) (1970)]. In error it was reported that none of the lands in the lease were in a KGS [known geologic structure] when in effect all of the lands in Section 35, T. 23 S., R. 31 E., NMPM, were included in an undefined addition to the James Ranch Field undefined known geologic

structure and consolidation of four unnamed, undefined known geologic structures effective September 9, 1973.

Skelly Oil Company filed a timely notice of appeal and statement of reasons. In its appeal, Skelly Oil Company's counsel argues that it is a bona fide assignee for value and without notice. As such, it assertedly falls within the terms of section 27(h)(2) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 184(h)(2) (1970). Said statutory provision bars the cancellation of an oil and gas lease "for violation of any of the provisions of this chapter" if "the title or interest of a bona fide purchaser of any lease" is "affect[ed] adversely." Id. The regulations pertinent to this provision, contained in 43 CFR, Subpart 3102 - Qualifications of Lessees, repeat the terms used in the statute.

Appellant's counsel points to <u>J. Penrod Toles</u>, 68 I.D. 285 (1961); <u>Duncan Miller</u>, A-30212 (July 13, 1964); <u>Duncan Miller</u>, A-30600 (December 1, 1966); and <u>Southwestern Petroleum Corp.</u>, 71 I.D. 206 (1964); <u>aff'd</u>, 361 F.2d 650 (10th Cir. 1966), <u>accord</u>, <u>Sarkeys</u>, <u>Inc.</u>, 1 IBLA 123, 77 I.D. 207 (1970). Appellant's argument is that, as a bona fide purchaser, it is protected from cancellation of this lease.

After receipt of appellant's arguments, this Board requested the Geological Survey to furnish certain information regarding the determination of the character of the lands involved in the subject lease. The information subsequently obtained from the Geological Survey indicated that it had not received information regarding these lands on Sunday, September 9, 1973, but that a well had been completed for production on September 9, 1973, in section 6, T. 23 S., R. 31 E., N.M.P.M., which was the basis for the statement in the challenged decision already quoted, <u>supra</u>. The Area Geologist further stated in this memorandum:

\*\*\* It is obvious that a lease drawn in the August Lottery and sent to Roswell for KGS status during September would not be known to me to be in this KGS during September because Roswell did not receive the well completion data until October 31, 1973.

In a further statement, appellant's counsel has directed our attention to this statement of the Area Geologist.

Appellant charges that under the meaning of "the date of the ascertainment of the fact," contained in the relevant regulation [43 CFR 3100.7-3], October 31, 1973, rather than September 9, 1973, was that date, and therefore its lease was properly issued on September 10, 1973.

Thus two issues of law have been raised by appellant.

- 1. Whether appellant's lease is protected from cancellation because appellant is a bona fide purchaser within the meaning of 30 U.S.C.  $\S$  186(h)(2) (1970).
  - 2. Whether October 31, 1973, is the "date of ascertainment" referred to in the regulations,
  - \* \* \* that is determinative of rights which depend upon whether the land is or is not situated within a known geologic structure of a producing oil or gas field. \* \* \*

#### 43 CFR 3100.7-3

Counsel for appellee agencies, the Bureau of Land Management and the Geological Survey, has argued in opposition to appellant that its lease is not protected from cancellation. Such cancellation assertedly was not based upon a violation of the law by the original lessee, but upon "administrative inadvertence" which resulted in the issuance of a lease which was a nullity because the Mineral Leasing Act of 1920, <a href="supra">supra</a>, requires competitive bidding for leases issued on a known geologic structure. Appellees' argument is that the bona fide purchaser provisions in the Act cannot be extended to the holder of a lease which was issued without authority of law, and thus was a nullity at that time. We agree.

The resolution of the issue regarding the protection of bona fide assignees necessarily rests upon the resolution of the issue of the meaning of "ascertainment." Therefore, was September 9, 1973, a date which followed the offer to lease on July 23, 1973, but preceded by one day the issuance of the lease on September 10, 1973, the date of ascertainment? Or was it October 31, 1973, the date on which the Geological Survey received the completion data on the well, "completed for production" on September 9, 1973?

In 1967, the Solicitor of the Department established the policy that where a known geologic structure (KGS) was ascertained or became known between the filing of an offer and the issuance of the lease, the lands involved may not be leased noncompetively. Solicitor's Opinion, M-36686, 74 I.D. 285 (1967). This policy is presently found in the regulations at 43 CFR 3100.7-3 - Date of determinative [sic] of rights. But this policy only bars noncompetive leasing of the tract in issue if the undefined KGS became "known" or "ascertained" on September 9, 1973, when the well was completed for production.

Thus the issue is the definition of "ascertainment." Appellant has argued that "[a]s was clearly indicated in the memorandum of the

Area Geologist, October 31, 1973, was clearly the date of the ascertainment of the facts \* \* \*."

Past cases have involved noncompetitive oil and gas leasing, but none of them directly dealt with the meaning of "ascertainment" of a geologic structure. For example, where a "formal definition" of a producing oil and gas field was prepared in May, based upon the completion between the previous December and April of three productive wells within 1/2 mile of a tract sought for a noncompetitive lease by application filed in June, the Department found that the tract could not be leased noncompetitively because it was a KGS when the application was filed. Sun-Tex Petroleum Company, A-24453 (April 4, 1947) at 2. 1/

Another case, decided four years later, dealt with an application for a noncompetitive oil and gas lease by the holder of the prior noncompetitive lease. The question was the ascertainment of a geologic structure on the date of the expiration of the previous lease. The former lease expired on September 30, and the official determination extending the boundaries of a KGS to include the disputed area was not made until later. However, three years prior to the expiration date, two producing wells, one northeast and the other west of the tract in issue, had been completed. The official determination, or pronouncement, was not based on facts learned subsequent to the primary lease's expiration, but was based on

\* \* \* the producing character of the formation under this land [which] was fully demonstrated more than three years prior to the date when the base lease expired.

The Texas Company, A-26214 (July 21, 1951) at 2.

A later case involved this set of facts: A district engineer of the Geological Survey witnessed a drill stem test on July 10 and 11. A

noncompetitive lease offer was filed on July 17. The district engineer mailed a telegram on July 20 which related the circumstances of his presence at the drilling site on July 10 and 11, and stated that it was "\* \* the opinion of this office that this is a discovery in paying quantities \* \* \*." The Departmental decision found that a well's completion in such circumstances is not a necessary prerequisite to a determination of limits to a KGS. Sheridan L. McGarry, A-29518 (July 29, 1963).

<sup>1</sup>/ The finding was made even though the Department had ruled, during May when the "formal definition" was prepared, that the previous lease on the tract was not extended because it was not within a KGS. However, the <u>Sun-Tex</u> decision pointed out that the refusal to extend was based on a "tentative definition" made the previous December before the three wells were completed. Id.

A recent case, <u>Robert B. Ferguson</u>, 9 IBLA 275 (1973), ably points out that even though lands may have been "clear listed" by the Geological Survey, and a noncompetitive oil and gas lease issued by the Bureau of Land Management, the Department of the Interior is not estopped from finding that the subject tract was within a KGS. The Ferguson decision relied for this rule on <u>Superior Oil Company</u>, A-28897 (September 12, 1962), which stated:

\*\* the crucial date is not the one upon which the Geological Survey learns of the pertinent fact, but the date upon which the pertinent facts become available. Wann v. Ickes, 92 F.2d 215, 217 (D.C. Cir., 1937); Ernest A. Hanson, A-26375 (May 29, 1952).

## <u>Id.</u> at 2.

On the dates of the offer for a noncompetitive lease and its issuance, the actual knowledge of the Geological Survey is immaterial. Rather, it is the availability of facts on those dates; facts upon which a later determination may be properly based. <u>Id</u>.

A determination, made after issuance of a noncompetitive lease, based on facts available or known before the date of the application therefor, can properly be made that the lands are within the known geologic structure of a producing oil and gas field. Wann v. Ickes, 92 F.2d 215 (D.C. Cir. 1937).

Therefore, it is apparent that though September 9, 1974, was a Sunday, and appellant's predecessor was issued a noncompetitive lease on the following Monday, the fact of a completed producing well was available on Sunday. Additionally, the fact that the Area Geologist did not personally know of the completion of the producing well before the lease was issued is irrelevant because the later pronouncement of the determination of the KGS status of this tract was based upon facts known and available before the lease was issued.

We now come to the issue regarding the protection of bona fide assignees. 30 U.S.C. § 186(h)(2) (1970). Appellant has argued that it acquired this oil and gas lease in good faith and without notice that the subject tract was on a known geologic structure of a producing oil and gas field.

As already mentioned, section 27(h)(2) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 184(h)(2) (1970), provides that the right to cancel or forfeit a lease due to violations of the provisions of the Act cannot be applied where the interest of a bona fide purchaser of a lease would be adversely affected. However, the statute also requires that the lease "\*\* was acquired and is held \*\*\* in conformity with those provisions \*\*\*."

Section 17(b) of the Act, as amended, 30 U.S.C. § 226(b) (1970), contains the following provision:

If the lands to be leased are within any known geological structure of a producing oil or gas field, they <u>shall</u> be leased to the highest responsible qualified bidder by competitive bidding \* \* \*. (Emphasis supplied.)

Appellees have argued that the Act has not been violated, and instead seek to characterize the issuance of this lease as "administrative inadvertence \* \* \* by personnel of the Bureau of Land Management." We do not agree, for as is apparent from the discussion regarding the ascertainment of the character of the geology underlying this leased tract, the issuance was not "administrative inadvertence." Rather, it was contrary to the statutory provisions requiring competitive bidding for lands underlain by known geological structures of producing fields. Thus it cannot be said that this lease, which was null when it was issued, somehow gained life by the fact of its purchase by appellant. Indeed, appellant cannot be said to hold this lease in conformity with the provisions of the Act, as is required by the provision, 17(h)(2), it seeks to cloak itself in. The public lands here involved were not subject to noncompetitive leasing under the Act and therefore a bona fide purchaser of a lease issued for those lands is not entitled to any protection. Oil Resources Incorporated, 14 IBLA 333 (1974).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

	Frederick Fishman Administrative Judge
I concur:	
Anne Poindexter Lewis Administrative Judge	

IBLA 74-183

### ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I must dissent from the holdings of the majority with respect to both of the principal issues raised by this appeal.

It is underiable that the date when land is known to be within the undefined geologic structure of a producing oil or gas field is the date of the ascertainment of that fact. However, I cannot agree that a fact has been ascertained by one who has no knowledge of it simply because evidence exists somewhere which, if known to him, would lead him to that conclusion.

The record in this case shows that at the time lease number NM 19199 issued, a producing well had been completed on another lease some five miles away on the previous day, and that this was unknown to the Geological Survey for a period of seven weeks after the lease was issued and for nearly a month after the effective date of the lease. If the date when the land in question was known to be within the geologic structure was the date that this fact was ascertained, two questions immediately arise: 1) ascertained by whom?; and, 2) ascertained how?

By regulation only the Director, Geological Survey (or an employee duly delegated to exercise the Director's authority in this area) may make a determination of geologic structures for purposes of the Mineral Leasing Act. 43 CFR 3100.7-1. It follows quite logically, I think, that the evidence must be in the hands of the authorized official of the Geological Survey before he may be said to have ascertained the fact.

The conclusion is premised upon the procedure which the Geological Survey officer must follow in making his determination. This is contained in Geological Survey Circular 419, which states in part:

In connection with undefined geologic structures, available information, generally consisting of data relating to a single well or a few wells, together with available geologic information, is reviewed by geologists; and a memorandum is sent to the manager of the appropriate land office making a determination that certain lands are as of a certain date "on structure" or within an undefined addition to a previously defined structure. (Emphasis added.)

Presumably, then, the mere fact that a producing well has been completed five miles or more from the land in question is not, of itself, an "ascertainment" of the fact that the subject land is within the limits of the same geologic structure, even if the

authorized officer knows of the well completion. Only after he correlates the information of the well completion with the other "available geologic information" is he able to ascertain that the two properties are on the same structure. Quite conceivably two properties separated by such distance might be found not to be on the same structure, despite the fact that one of them is producing.

To recapitulate, it is my analysis that the "date of ascertainment of the fact" in the context of 43 CFR 3100.7-3 can only be fixed at a time after the authorized officer learns of the production and, by correlating other available geologic data, reaches the conclusion that the producing property is probably on the same geologic structure as the property which is the subject of the inquiry.

To hold otherwise would be analogous to concluding that a detective "ascertained" the identity of the criminal on the date the criminal left his fingerprints at the scene of the crime, rather than when the fingerprints were discovered, identified and correlated with other available information concerning the crime.

In the physical sciences, which include geology, there is virtually limitless data "available" from which an infinite number of determinations may be made. But it would be ludicrous to suggest that the date of all these future determinations - the date of ascertainment - was the date upon which the facts "became available."

The "availability" of a fact is itself a relative concept. Let us hypothesize a situation where a farmer drilling a water well strikes oil on his private land but, for reasons of his own, caps the well, tells no one, but consigns a record of his discovery to his safety deposit box for the use of his heirs, where it remains undisclosed for 20 years. May it truly be said that the "date of ascertainment" that adjacent federal land was on a known geologic structure was the date of the farmer's discovery of oil, because that was the date the fact became "available"? If not, then did such information become available to the USGS when the executor of the farmer's estate opened the box and reviewed its contents with the heirs and their lawyer? Or when the cap was removed and the old well actually began to flow oil again? Or when an oil company scout obtained confidential information of the fact? Or when the state regulatory commission was informed officially? As the disclosure progresses, the character of the information changes from virtually unavailable to ever-increasingly available, until finally it is brought to the attention of the USGS, at which time it is actually available for the use of that agency.

In my opinion, the past availability of an undisclosed fact has little, or nothing, to do with the date upon which that fact

was ascertained by a particular federal official whose duty it is to relate that fact to other available data and make an official determination on the basis of his conclusion. The filing of any offer for a noncompetitive lease creates no vested rights in the offeror, and the offer must be rejected if the lands <u>are found</u> to be within a known geological structure at any time prior to the issuance of the noncompetitive lease. <u>Silver Monument Minerals, Inc.</u>, 14 IBLA 137 (1974); <u>T. D. Skelton</u>, 9 IBLA 322 (1973).

I agree with the holding in Solicitor's Opinion M-36686; 74 I.D. 285 (1967), that where the KGS character of the land is ascertained after the filing of a noncompetitive lease offer and before the issuance of the lease itself, the ascertainment of the fact that the land is within the known geologic structure of a producing oil or gas field raises a statutory barrier against issuance of any noncompetitive lease of that land. The decision in Sun-Tex Petroleum Co., A-24453 (April 4, 1947), cited by the majority, is simply a case where the Department refused to issue a noncompetitive lease to an offeror because the Department had determined that the land was KGS. The case of Robert B. Ferguson, 9 IBLA 275 (1973), upon which the majority places heavy reliance, offers considerably more difficulty to my position, but even that case may be distinguished from this one. In Ferguson, the lease issued on January 18 based upon an earlier report by the USGS that the land was not on a KGS. However, the USGS had made an actual reclassification of the land as KGS on January 17, but failed to communicate this information to the Bureau of Land Management until nearly four years later. The Bureau then canceled the lease, and this Board affirmed that action on appeal. The critical distinction, however, is that in Ferguson there was an actual classification of the land as within a KGS made by the Acting Director of the Geological Survey one day prior to the issuance of the lease. In this case the classification action came seven weeks after the lease had issued and related back to the day before the lease issued on the basis that information of the well completion was theoretically "available," and the fact was therefore "ascertained" on that date.

The decision in <u>Ferguson</u> relied exclusively on the holding in <u>Superior Oil Co.</u>, A-28897 (September 12, 1962), and quite properly so, because in <u>Superior Oil</u> it was held that "\*\* \* where the facts on which that [KGS] determination is made are <u>known prior</u> to the filing of a noncompetitive oil and gas offer, although the announcement of that determination is not made until later." (Emphasis added.) Therefore, <u>Superior Oil</u> is not precedent for the holding in this case, since the facts necessary for the classification were <u>not</u> known in this case until long <u>after</u> the lease had issued and been assigned. However, the <u>Superior Oil</u> decision does contain the following statement, which although it appears to be dicta, cites a Federal Court of Appeals decision:

\*\*\* The crucial date is not the one upon which the Geological Survey learns of the pertinent fact, but the date upon which the pertinent facts became available. Wann v. Ickes, 92 F.2d 215, 217 (D.C. Cir., 1937); Ernest A. Hanson, A-26375 (May 29, 1952). Thus it is immaterial whether the Survey knew on March 15, 1960, whether the land involved was "on structure" so long as it based its determination on facts that were available before the appellant filed its offer.

Nevertheless, a reading of <u>Wann</u> v. <u>Ickes, supra,</u> does not support the proposition stated in the quotation above. The plaintiff in that case applied for an oil and gas prospecting permit in 1935. The Court quoted the following paragraph from the Secretary's decision:

An examination of the Secretary's decision convinces us that it was neither arbitrary nor capricious. In part, it states as follows:

"The records of the Geological Survey show that \*\*\* Sec. 5, T. 23 N., R. 15 W. [on which plaintiff applied for a permit to prospect] are within the known geologic structure of the Rodessa oil and gas field. This has been known since 1931. The dip of the formation is shown to be very gentle to the north, so that there is just reason for regarding the tracts as being in proven territory. It will be noted that oil was discovered almost a month before the alleged posting was made, and of course gas had been discovered a little to the south almost five years before that time."

[1] This finding of fact by the Secretary is the vital point upon which plaintiff's case must stand or fall.

Nor is the quotation from <u>Superior Oil</u> supported in any way by the decision in <u>Emest A. Hanson</u>, <u>supra</u>, which merely says that it is the date of ascertainment of the fact rather than the date of pronouncement which is controlling, a statement with which I am in full accord.

It therefore appears to me that the <u>only</u> authority in support of the majority position on this issue is the apparent dicta found in the above quotation from <u>Superior Oil Co.</u>, <u>supra</u>, which I regard as a distortion of the English language. It is palpably wrong to

hold that, "it is immaterial whether the Survey knew \* \* \* whether the land was 'on structure' so long as \* \* \* facts were available \* \* \*," when the statutory requirement is that the land be found to be within a <a href="mailto:known">known</a> geologic structure, and only the Survey can make this finding. Obviously, the Survey cannot "ascertain" that a fact is "known" if the Survey doesn't know the fact.

I now turn to the issue of whether the statutory protection afforded to bona fide purchasers is available to this appellant.  $30\,\mathrm{U.S.C.}$ 

§ 184(h)(2) (1970). Of course, a consideration of this question would be unnecessary if my view of the "date of ascertainment" was found to be correct, as there would then be no basis for cancellation of the lease. But even assuming that my concept of that issue is in error, and the lease would be subject to cancellation, I am convinced that the statute precludes cancellation in this instance. While the majority takes the position that the lease was null and void ab initio, I regard it as, at most, merely voidable. There can be little question but that the lease when issued, and when assigned, was regular on its face and efficacious for all its purposes. No violation of the law was known to any of the parties or to any concerned agency of the Government. As such, it was a prima facie valid instrument. It was only upon the subsequent determination by the Survey that the basis for cancellation was found to exist. That basis was, of course, that the original lessee had tendered a noncompetitive offer and received a noncompetitive lease of land on a known geologic structure in violation of the pertinent law. However, by the time this determination was reached the lease had passed into the possession of the appellant, a bona fide purchaser. As hereinbefore stated, the Geological Survey, when it finally learned of the completion of a producing well more than five miles away, might have reached a determination that this lease was not on the same structure, in which case the lease would have continued as a valid instrument. Therefore, because the subsequent determination.

Thus, this case may be distinguished from Oil Resources Incorporated, 14 IBLA 333 (1974), where a lease was issued in error for lands which had been previously closed to leasing and therefore were unavailable as a matter of record and as a matter of law at the time the lease issued. In that case there was no possible alternative, and this Board properly held that the lease was a nullity. "A thing is void which is done against the law at the very time of doing it (as in Oil Resources Incorporated, supra). But a thing is voidable when done by a person (substitute 'Bureau of Land Management' for 'person') who ought not to have done it, but who nevertheless can avoid it after it is done." Anderson v. Roberts, 9 Am. Dec. 235 (N.Y. 1820).

It is rarely that things are wholly "void" and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are "voidable" which are valid and effectual until they are voided by some act, while things are often said to be void which are without validity until confirmed. Weeks v. Bridgeman, 159 U.S. 541, 547 (1895), Toy Toy v. Hopkins, 212 U.S. 542, 548 (1908).

Accordingly, if I considered it necessary to reach the issue, I would hold that appellant, as an approved bona fide purchaser by mesne assignment, is protected by statute against the cancellation which would otherwise result from the original lessee's unlawful acquisition of the lease. See Southwestern Petroleum Corp. v. Udall, 361 F.2d 650 (10th Cir. 1966).

Edward W. Stuebing
Administrative Judge